Statement of Senator Dianne Feinstein on the Nomination of William Myers

April 1, 2004

***Washington, DC** – The U.S. Senate Judiciary today approved the nomination of William Myers to the 9th Circuit Court of Appeals. Following is the prepared statement of Senator Dianne Feinstein (D-Calif.), who opposed Mr. Myers' nomination:*

"Mr. Chairman, I intend to vote No on the nomination of William Myers. I come to my decision after a careful review of his professional record.

I met with William Myers and I found him to be an extremely polite and personable man. But I have serious reservations about whether he has the professional qualifications to serve on the Ninth Circuit. I also have serious doubts about his ability to rule on cases, particularly environmental and land-use cases, in an impartial, even-handed way.

A position on the appellate court should be reserved for our nation's best legal minds and most accomplished attorneys. But, the American Bar Association gave Mr. Myers a partial 'not qualified' rating. A key factor was his lack of legal experience.

This nominee has little litigation experience in either state or Federal court. By his own account, he has taken only a dozen cases to verdict – and six of those occurred before 1985 when he was a newly minted lawyer. He has never served as a counsel in criminal litigation. Even as Solicitor of the Department of Interior, Myers took no hand in writing legal briefs.

Mr. Myers has spent a large part of his legal career as a lobbyist for cattle and grazing interests. Attorneys are obligated to zealously represent their clients and there is nothing wrong with this representation. But, I am troubled by a number of extreme comments that he made as an advocate because of what these comments reflect about his judgment and his willingness to offer 'sound bites' and rhetorical flourishes in the place of legal scholarship.

For example, in a 1996 article, Myers equated Federal management of rangelands with the '*tyrannical actions of King George'* against the American colonists.

According to Myers, these tyrannical practices included '*over-regulation and efforts to limit [ranchers'] access to federal rangelands, revoke their property rights, and generally eliminate their ability to make a living from the land.'* Equating Federal rangeland policy with the tyrannical policies that sparked the American revolution is strong language. But when asked by Senator Leahy to back up his claim, Myers could not come up with any examples.

Similarly, after the California Desert Protection Act was passed, he described the law as '*an example of legislative hubris*.' As the author of the California Desert Protection Act, I was quite struck by this statement, and Myers himself has acknowledged his '*poor choice*' of words. The California Desert Protection Act created the Joshua Tree National Park, the Death Valley National Park, and the Mojave National Preserve. These are among our nation's environmental jewels.

In total, the Act set aside 7.7 million acres of pristine California wilderness, 5.5 million acres as a national park preserve, and provided habitat for over 760 different wildlife species. It has provided recreation and tourism for over 2.5 million people, provided more than $237 million in sales, more than $21 million dollars in tax revenue, and more than 6000 new jobs. This is what Myers called 'legislative hubris.'

Similarly, in a 1994 article, entitled 'Having Your Day in Court,' Myers railed against activist judges who were '*legislating from the bench.'* To illustrate his argument, he wrote that '*.. No better example can be found than that of wetlands regulation. The word 'wetlands' cannot be found in the Clean Water Act. Only through expansive interpretation from activist courts has it come to be such a drain on the productivity of American agriculture*.'

When I and other Senators pointed out that ten years prior to his article, the Supreme Court had unanimously upheld the application of the Clean Water Act to protect wetlands, Myers backtracked and acknowledged Supreme Court precedent.

He further acknowledged that could not recall any specific cases that would justify the argument he made in his article. Similarly, Myers in another article wrote that environmental groups *are 'mountain biking to the courthouse as never before, bent on stopping human activity wherever it may promote health, safety, and welfare.'*

When queried about these statements, Myers again backtracked. And he has argued that he was merely the zealous attorney taking tough positions on behalf of his client. Nevertheless, these caustic, shoot-from-the-hip arguments Myers trouble me because of their reflection of his approach to legal advocacy.

There is one area of Myers' career where he can't attribute his words and actions solely to his role as a legal advocate. It is Myers' troubling body of work as Solicitor of the Department of Interior in the Bush Administration, that provided for me the 'tipping point' against his nomination. As Solicitor of Interior, Myers' client was the American public. He had a duty to carry out his work in an impartial fashion just as he would if confirmed to be a Ninth Circuit judge. Nevertheless, on multiple occasions as Solicitor, Myers engaged in actions that raised questions about his impartiality and professional qualifications.

One of Myers two formal opinions as Solicitor involved the proposed Glamis Gold Mine in California. During the Clinton Administration, then Solicitor Leshy wrote an opinion that led to the denial of an industry proposal which would have carved an 880 foot deep, mile-wide, open-pit gold mine out of 1600 acres of ancestral tribal land in imperial County California.

The Leshy opinion came out of an exhaustive review process spanning five years, three environmental documents, as well as several formal government-to-government consultations with the affected tribe, the Quechan Tribe. Within months of becoming Solicitor, Myers reversed the Leshy opinion.

In coming to his decision, Myers met personally with industry representatives, but not with the affected tribe. This one-sided dealing cannot be justified or explained away. Particularly because

Myers was mandated by law to engage in government-to-government consultation with the tribes and to protect sacred Native American religious sites.

Given that Myers would not even meet with the tribes to hear their point of view, it was not surprising that when Myers subsequently issued an opinion in favor of the industry, the District judge determined that Myers *'misconstrued the clear mandate'* of the applicable environmental law.

In his only other major opinion as Solicitor, Myers reversed a Clinton Administration regulation on grazing permits challenged by his former clients, the Public Lands Counsel. The issue involved whether environmental groups such as the Grand Canyon Trust could buy grazing permits from willing sellers in order to retire them. Myers, contrary to his strong support for property rights and free-market principles in other areas of government regulation, found such a practice illegal.

Third, as the Los Angeles Times recently reported recently, Solicitor Myers recommended that California Representatives Herger and Doolittle introduce a private relief bill giving $1 million worth of public land in Marysville, CA to a private firm.

The land, called locally the Yuba Goldfields, is part of 9,670 acres of gravel mounds and ponds created by hydraulic mining during the 19th century. According to the Bureau of Land Management, the land contains sand and rock that could be worth hundreds of millions of dollars for construction projects.

It turns out the companies seeking legislative relief did not have a valid claim to the land and had never even paid taxes on the property. And since 1993, the property had been carried on the county's tax records as public lands.

I am concerned that Myers committed the Department to support a bill without first doing the basic research needed to evaluate the issue, like consulting with local Bureau of Land Management officials.

Based on Myers' record, over 170 national groups have decided to oppose his nomination, including organizations that usually don't get involved in nominations. The National Congress of American Indians (NCAI), a coalition of more than 250 tribal governments, is opposing the nomination and they previously have not weighed in on any Bush nominated judges.

The National Wildlife Federation, which has never in its 68 history opposed a judicial nominee, opposes Myers.

In closing, I would offer the observations of Joseph Sax, a nationally renowned professor of environmental and natural resources law at the Boalt Hall, U.C. Berkeley, who is familiar with Myers' work.

Sax writes*: 'I do strongly believe that we are entitled to persons of professional distinction appointed to important posts such as that of the U.S. Court of Appeals. Neither based on his experience as a practicing lawyer, nor while serving as Solicitor at Department of Interior has Myers distinguished himself, nor has he made any significant contributions to the law in his writings …* We can do much better.'

Given Myers' unremarkable record and the serious questions about his capability to judge cases impartially, I do not believe we should confirm him to the Ninth Circuit. So, I will vote No."

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